[ORAL ARGUMENT NOT YET SCHEDULED]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-3054

IN RE: ROGER JASON STONE, JR.; NYDIA STONE; ADRIA STONE; JEANNE ROUCO-CONESA; JOHN BERTRAN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 19-cr-18-ABJ

GOVERNMENT'S OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

INTRODUCTION AND SUMMARY

Petitioner Roger J. Stone, Jr. is charged with obstructing a congressional investigation, making false statements to Congress, and witness tampering. Soon after being released on bond subject to limited conditions, Stone posted online a picture of the district judge with crosshairs and publicly accused the court of bias. Following a hearing, the court discredited Stone's "evolving and contradictory" testimony about the posting and found that "the effect and "very likely the intent" was "to denigrate this process and taint the jury pool." The court further found that Stone's conduct "posed a very real risk" of inciting violence, and that his extrajudicial statements are "likely to interfere" with a fair trial. Based on the defense's suggestion of what Stone "would find clear enough to follow," the court modified Stone's conditions of release to prohibit

public statements about the case and related matters.

Over the following months, Stone repeatedly violated that order. Among other things, he posted on Instagram and Facebook about matters that he claimed—and continues to claim—are important to the criminal case. The court again held a hearing and found that Stone's goal was to "draw maximum attention" to allegations about the investigation, "to gin up more public comment and controversy" and "to get people to question the legitimacy of this prosecution." The court stated that it did not want to revoke Stone's bond, but given his pattern of behavior and "the clarity" of the order, the court found that Stone was unwilling or unable to comply with the conditions of his release. Rather than incarcerate Stone, the court modified the restriction "so that it calls for no interpretation … and compliance will be easier to achieve," adding that Stone "may not post or communicate on Instagram, Twitter, or Facebook."

The district court's approach was a careful and incremental application of governing legal standards to Stone's misconduct. District courts have broad discretion when crafting conditions of release to ensure fair and expeditious trials and the safety of those involved. Faced with a defendant intent on influencing the jury pool and unwilling or unable to follow all but the clearest orders—findings that Stone does not seriously challenge—the district court acted incrementally by initially imposing minimal restrictions and only increasing them, once at the defense's suggestion, as Stone flouted the court's authority. Each time, the court protected Stone's liberty while taking steps necessary to mitigate serious risks of prejudice to the pending proceedings and the

safety of others. Certainly by the most recent order, the district court had ample basis to remand Stone to custody, but instead imposed a further condition that, it hoped, Stone could follow.

Petitioners do not acknowledge the extraordinarily high bar for issuing a writ of mandamus. In particular, they do not and cannot meet their burden of establishing that the district court's orders were clear and indisputable abuses of the court's broad discretion. Petitioners do not dispute that Stone repeatedly violated conditions of release by making case-related public statements. Nor do petitioners challenge the district court's factual findings about Stone's intentions, behavior, and need for clear rules. Although petitioners dispute the need for the challenged conditions, most of those conditions were suggested by the defense. And while the district court made clear that its constitutional analysis was guided by *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), petitioners do not address that case at all. In these fact-intensive circumstances, this Court should be at its most vigilant not to interfere with the district court's exercise of its broad discretion. The petition for a writ of mandamus should be denied.

STATEMENT

A. Criminal Charges and Initial Conditions of Release

On January 24, 2019, the grand jury returned a seven-count indictment charging petitioner Roger J. Stone, Jr. with obstructing a congressional proceeding in violation of 18 U.S.C. § 1505, making false statements to Congress in violation of 18 U.S.C. § 1001(a)(2), and witness tampering in violation of 18 U.S.C. § 1512(b)(1). 1A5-27. The

Indictment alleges that during an investigation of Russian interference in the 2016 presidential election and related matters, Stone lied to Congress about communications with and about an organization believed to have posted Democratic National Committee files stolen by Russia (Wikileaks), and that Stone threatened another witness not to reveal Stone's lies. Stone was released subject to limited conditions, including travel restrictions and bars on contacting witnesses or possessing weapons. *E.g.,* 1A28-30.

At an initial status conference, the district court observed that there had "already been considerable publicity" about the case, "fueled in large part by extrajudicial statements of the defendant himself," and invited views on entering an order to all parties under Local Criminal Rule 57.7(c) to "refrain from making further statements to the media or in public settings that are substantially likely to have a materially prejudicial effect on the case." 1A41-42. Stone opposed "any [o]rder," raising vagueness concerns and urging among other things that publicity "will subside." 1A31-37. The government did not oppose a narrowly-tailored order, noting that Stone's public statements had "included commentary on the merits of the charges, the nature of the evidence, the identity and credibility of possible trial witnesses, and the motives of the prosecution." 1A48.

On February 15, the court issued a limited order prohibiting counsel from making statements that "pose a substantial likelihood of material prejudice" and prohibiting all participants from making statements in the immediate vicinity of the

courthouse that "pose a substantial likelihood of material prejudice to this case or are intended to influence any juror, potential juror, judge, witness or court officer or interfere with the administration of justice." 1A51-54. The court declined to issue "additional restrictions" on Stone's "public statements or appearances at th[at] time" but made clear that "this order may be amended … if necessary." 1A54.

B. February 21, 2019 Condition

Three day later, on February 18, 2019, Stone posted on Instagram a photograph of the district judge in this case with crosshairs in the corner alongside commentary accusing the judge of bias, including "#fixisin," "Obama-appointed Judge," and references to Hillary Clinton and Benghazi. 1A83-84, 103. When the matter received substantial attention, Stone filed a "Notice of Apology," 1A55-57, but simultaneously defended the post and again suggested that the district judge is biased, 1A84-86.

The district court issued an order to show cause and held a hearing. Stone chose to testify and conceded that he had "abused" the court's "trust," but blamed his "lapse of judgment" on "stress." 1A68-70. He asked for a "second chance" and promised to "treat the Court and all [its] orders scrupulously." 1A71. Stone also provided shifting explanations about the crosshairs and how it was posted. Among other things, Stone represented that he "did not select the image" or "review it," but acknowledged upon questioning that he posted the image and chose it from several options provided by a "volunteer." 1A69, 81-83. Stone denied recalling that volunteer's name or who had been working for him and accessing his phone just days prior, even though he had just

"a few volunteers." 1A79-83, 88-90.

The court asked whether "incidents like this" would happen again, and defense counsel acknowledged that Stone "sometimes is unrestrained in his talking" but observed that Stone had now been warned. 1A92-93. When asked how to craft an order that Stone "would find clear enough to follow," defense counsel said Stone "should not be talking about this Court," "talking about the special prosecutor" or "impugning the integrity of the Court." 1A98. "That's what should be done," counsel added, and "[t]hat's the nature of the order that I'm suggesting." 1A98. Counsel thus declared that any "order should say" that Stone cannot attack the Court, the government or "[t]he integrity of this case." 1A99. "We will defend this case at the trial," counsel continued, "[t]hat's the time to defend this case." 1A99. Counsel stressed, "that is the kind of nature of an order that I would suggest the Court should craft that would address the specific needs that we're talking about." 1A99.

The district court modified Stone's conditions of release and its media-contact order to mirror the defense's suggestion. The court found Stone's "evolving and contradictory" testimony about the crosshairs post not "credible." 1A102-104. The court observed that Stone had been charged with, among other things, "threatening witnesses" and that "the evidence detailed in the indictment alone is quite compelling." 1A101. Yet, the court explained, "he has decided to pursue a strategy of attacking others." 1A101. The court recognized that Stone's statements did not violate a condition of release. 1A101-102. But the court expressed "concerns" that Stone

"chose" to act in a manner that "can incite others" and that Stone's approach "posed a very real risk that others with extreme views and violent inclinations" may act. 1A102; *see* 1A103-107. The court further found that "the effect and very likely the intent of the post was to denigrate this process and taint the jury pool" and expressed concern that Stone's statements can "frustrate" the goal of ensuring "a fair trial by an impartial jury." 1A105-106, 109. The court also considered "the context" of Stone's behavior: that it occurred just "three days" after the court flagged the risks of case-related publicity but entered a highly-limited order governing public statements. 1A104-105. The Court noted its responsibility to "ensure that the trial does not devolve into a circus" and that Stone's "fanning the flames" would only exacerbate the problems that can arise in cases that generate significant publicity. 1A106-107.

Citing the Bail Reform Act (18 U.S.C. § 3142(c)), Local Criminal Rule 57.7(c), and the Supreme Court's decision in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the district court found that Stone's extrajudicial statements pose a danger to others and a "substantial risk of material prejudice to the case and the due administration of justice," and that the restrictions suggested by Stone's counsel are "necessary" and "the least restrictive means" of addressing these risks. 1A105-108. Mirroring the defense's suggestion, the court modified Stone's conditions of release and the prior media-contact order to establish the "clear boundaries" that Stone "apparently need[s.]" 1A108. The court prohibited public statements about the "investigation or this case or any of the participants in the investigation or the case." 1A114. The court clarified that this

"includes, but is not limited to, statements made about the case through … Facebook, Twitter, Instagram, or any other social media" and that Stone cannot "comment publicly about the case indirectly, by having statements made publicly on his behalf." 1A114. The court stressed that Stone could still fundraise for his defense, declare his innocence, be "part of the public discourse," and "continue to publish, to write, and to speak" on "any other matter." 1A108. And the court made clear that if Stone "cannot or will not or do[es] not comply," it will be "necessary to adjust [his] environment" to remove "the temptations posed by cameras, phones, computers and microphones." 1A109.[1]

C. July 16, 2019 Condition

In the following months, Stone repeatedly violated the court's order, making numerous public comments—typically on Instagram and Facebook—about the pending case and related matters. These included a post asking "Who Framed Roger Stone," 1A192, 2A44; a post about Stone's arrest asking what the FBI "could possibly be hiding," 1A162; a post touting that Stone had "challenged the entire 'Russia hacked

[1] On March 1, Stone moved to "clarify," representing that before the February 21 hearing, he sent material about the relevant investigations to his publisher for a book with an "imminent general rel[e]ase." 1A116-122; *see* 2A4-17 (sealed exhibits). After obtaining more information, including that the book was already available, 1A125; 2A19-44, the court found that Stone's motion had "misrepresent[ed]" the book's timing, faulted Stone for not previously informing the court "of the publication effort that had been underway for weeks," and questioned whether the motion to clarify "filed after publication was a *fait accompli* – was intended to serve as a means to generate additional publicity for the book." 1A133-135. The court took the matter under advisement. 3/14/19 Tr. 4-10.

the DNC/CrowdStrike' claim," 1A164; a photograph of former-CIA Director Brennan stating "This psycho must be charged, tried, convicted … and hung for treason," 1A165; and a statement to *Buzzfeed* about whether Stone had told then-candidate Trump about communications with Wikileaks, 1A190-192.

Even after Stone opined that whether Russia hacked the DNC is significant to his case, *e.g.*, Doc. 70, at 1-2; 5/30/10 Tr. 100-103, Stone posted statements on those subjects. For example, Stone posted an article about a filing in the case: "US Govt's Entire Russia-DNC Hacking Narrative Based on Redacted Draft of CrowdStrike Report." 1A158. Stone tagged major media outlets. 1A158. Stone posted two articles about defense filings: "FBI Never Saw CrowdStrike Unredacted or Final Report on Alleged Russian Hacking Because None was Produced." 1A159, 161. On one post, he added, "The truth is slowly emerging." 1A161. Stone also posted an article titled, "Stone defense team exposes the 'intelligence community's' betrayal of their responsibilities" and quoted, "the Russia Hoax is being unwound" and "the legal team defending Roger Stone" had "exposed" a "Jaw-dropping example" of high-level government corruption. 1A160. Stone again tagged major media outlets. 1A160.

The government brought Stone's latest postings to the Court's attention, alleged that Stone had violated the February order, and expressed concern that Stone's posts appeared calculated to generate media coverage of information that could prejudice potential jurors. 1A154-155. The defense argued that reposting articles or graphics originally produced by others did not constitute statements by "Stone"; that "rhetorical

question[s]" were not "statements"; and that posts about court filings, Stone's arrest, or the truthfulness of potential witness were not statements about the "case." 1A170-174, 191-208. Stone also claimed through counsel that his attorney had approved one statement, but defense counsel denied any such recollection when asked. 1A191-192.

On July 16, following a hearing, the court modified the conditions of release and media-contact order. The court began by noting that it had entered the February 21 order based on defense counsel's suggestion but that within "a week" Stone "was emailing *Buzzfeed*, calling a witness in this investigation a liar." 1A218. The court then reviewed Stone's myriad social media posts and found that he had violated the February order. While some of Stone's posts may have been a "nudge at the line," and some "were initially statements made by other people," the court explained that Stone was "spreading" commentary "with his imprimatur" and sometimes adding his own statements, thus plainly violating the court's order. 1A220-221. The court found that Stone's "obvious purpose" was "to gin up more public comment and controversy about the legitimacy of the Mueller investigation and the House investigation to get people to question the legitimacy of this prosecution." 1A221-222.

The court deferred initiating contempt proceedings, which "could generate more pretrial publicity." 1A223. The court also stated that it was "not inclined" to revoke Stone's bond. 1A223. But given "the clarity" of the order and Stone's pattern of misconduct, false assurances, and incredible explanations, the court expressed concern about Stone's ability and willingness to comply. 1A223-224. The court stressed that it

had twice given Stone "the benefit of the doubt" but Stone's conduct did not match his "assurances" and his explanations "twist[ed] the facts" and "twist[ed] the plain meaning of the order." 1A223-224. The court found that Stone had shown himself "unwilling" to follow the court's orders and wished to draw "maximum attention to what [he] view[s] as flaws in the investigation." 1A224. Given Stone's pattern of conduct, his prior assurances, and his claimed explanations, the court determined that it was necessary "to modify the conditions of release and make the restriction even more clear so that it calls for no interpretation … and compliance will be easier to achieve." 1A224. The court thus added an "additional condition" that Stone "may not post or communicate on Instagram, Twitter or Facebook in any way." 1A224, 227-228; *see also* 1A229-230 (July 17 order reiterating that the prior orders remain in force and clarifying those orders).

ARGUMENT

Mandamus is a "drastic" remedy appropriate only in "extraordinary" circumstances. *In re Al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015). Petitioners must, at a minimum, show that there is "no other adequate means to attain the relief," that the "right to issuance of the writ is clear and indisputable," and that "the writ is appropriate under the circumstances." *Id.* (quoting *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-381 (2004)). Petitioners do not even acknowledge those requirements and cannot

make these demanding showings.[2]

I. Petitioners Have Not Established A Clear And Indisputable Right To Relief

Parties seeking mandamus must "demonstrate a clear and indisputable right to the writ," by establishing a "clear abuse of discretion or usurpation of judicial power." *Al-Nashiri*, 791 F.3d at 82; *see id.* at 86 (any error must be "'clear' *ex ante*"). Petitioners have not and cannot make that extraordinary showing. The district court was faced with a defendant intent on influencing the jury pool, who had risked inciting violence, was trying to stoke controversy and publicity, and was unwilling or unable to follow all but the clearest orders. The court exercised its broad discretion in imposing incremental conditions of release to ensure the fair conduct of this case and the safety of all involved. Petitioners do not seriously challenge the district court's key findings or engage with its

[2] Petitioners include Stone's relatives who are not subject to any order. *See* 1A114-115, 227-230. Because the February 21 (but not July 16) condition clarified that Stone cannot act "indirectly by having statements made publicly on his behalf," 1A114-115, 229-230, those petitioners contend (Pet. 2, 4-5, 27-28) that they are "chilled" because their statements could raise questions whether Stone directed them to act. These non-party petitioners lack standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 418-19 (2013) (parties "cannot manufacture standing . . . based on their fears of hypothetical future harm" or "by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part"); *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004) (no third-party standing where rightholder can assert his own rights). This derivative theory of injury is also a further reason to deny them mandamus. Because Stone has standing, however, and because the mandamus requirements are themselves jurisdictional, *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016), the Court need not address those issues.

legal analysis. They have not come to close to establishing the sort of gross abuse of discretion that could warrant mandamus.

A. The District Court Acted Well Within Its Discretion

1. Criminal trials "are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quotation marks omitted). And it is axiomatic that those involved in the administration of justice should be able to conduct their responsibilities without fear or threat. District courts accordingly have ample discretion to ensure the fair and expeditious conduct of cases and the safety of those involved, including by imposing conditions of release on criminal defendants. *See, e.g.,* 18 U.S.C. § 3142(c) (non-exhaustive list of release conditions); *see also* D.D.C. L. Cr. R. 57.7(c) (authorizing restrictions on extrajudicial statements by parties, witnesses, and attorneys). In fact, the Bail Reform Act encourages judges to fashion conditions of release that will obviate the need for pre-trial incarceration. *See* 18 U.S.C. § 3142(c)(1)(B). These conditions sometimes have First Amendment (and other constitutional) implications. *See, e.g.,* 18 U.S.C. § 3142(c)(1)(B)(exemplary conditions including restrictions on contacting victims or potential witnesses and possessing weapons).

As the district court recognized, the Supreme Court has provided guidance about appropriate restrictions on criminal-trial participants. *E.g.,* 1A62, 106-107. Trial courts must "protect their processes from prejudicial outside interferences," and "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement

officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Sheppard*, 384 U.S. at 363; *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). Courts must be careful to prevent a "carnival atmosphere at trial" and to ensure that participants in the case do not release "leads, information, and gossip" that could fuel "rumors and confusion." *Sheppard*, 384 U.S. at 358-359, 361.

In *Gentile*, the Court upheld a rule barring attorney statements that created a substantial likelihood of prejudice. The Court explained that "[t]he outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding." 501 U.S. at 1070. "Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel giving their version of the facts," said the Court, "obviously threaten to undermine this basic tenet." *Id.* For this reason, "the speech of *those participating before the courts*" can be "limited" based on a lesser showing than that required to limit speech about pending litigation by those who are not participants. *Id.* at 1072 (Court's emphasis). The Court acknowledged that in some instances threats to a fair trial could be addressed through voir dire and other procedures. *Id.* at 1075. But the Court endorsed restrictions on comments that are "likely to prejudice the jury venire," explaining that "[e]ven if a fair trial can ultimately be ensured" through such steps, "these measures entail serious costs to the system." *Id.*

While *Gentile* involved a restriction on lawyers, courts have applied *Gentile* to uphold orders restricting the speech of "trial participants," including both lawyers and

parties, where the order is supported by a "'substantial likelihood'…that extrajudicial commentary by trial participants will undermine a fair trial" and "is also narrowly tailored and the least restrictive means available." *United States v. Brown*, 218 F.3d 415, 428 (5th Cir. 2000) (citing *Gentile*).[3] In *Brown*, the Fifth Circuit upheld an order prohibiting attorneys, parties, or witnesses "from discussing with 'any public communications media' anything about the case 'which could interfere with a fair trial,' including statements 'intended to influence public opinion regarding the merits of this case,' with exceptions for matters of public record and matters such as assertions of innocence." *Id.* at 418. *Brown* concluded that *Gentile* applied to restrictions on parties because "the problem the district court sought to avoid depended in no way on the identity of the speaker as either a lawyer or a party." *Id.* at 428.

Applying this standard, the Fifth Circuit upheld the district court's order. The court of appeals noted that the case "had attracted intense and extensive media attention." *Id.* In this context, the order was supported by findings that the parties had "already demonstrated a desire to manipulate media coverage to gain favorable attention," thereby threatening to taint the jury pool. *Id.* at 429. The court further concluded that the order was "sufficiently narrow" and "provide[d] sufficient guidance

[3] Some courts in pre-*Gentile* opinions phrased the standard in terms of "reasonable likelihood" rather than "substantial likelihood." *E.g., Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 610 (2d Cir. 1988); *In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984); *United States v. Tijerina*, 412 F.2d 661, 666-667 (10th Cir. 1969). The district court applied the higher standard, and in the context of this mandamus petition this Court need not decide between the two.

regarding the nature of the prohibited comments." *Id.* at 429-430. Finally, *Brown* decided that less restrictive alternatives, such as "change of venue, jury sequestration, 'searching' voir dire, and 'emphatic' jury instructions," would be "inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity." *Id.* at 431; *see also Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 611-612 (2d Cir. 1988) (affirming order restraining trial participants from speaking with the press on the ground that "failure to restrain the trial participants would add 'fuel to an already voracious fire of publicity' and create 'a real and substantial likelihood that some, if not all, defendants might be deprived of a fair trial" and that less restrictive alternatives would not be effective); *In re Russell*, 726 F.2d 1007, 1008-1010 (4th Cir. 1984) ('tremendous publicity" and "potentially inflammatory" statements supported order to "potential witness[es]" even absent a hearing or "specific, articulated findings"); *United States v. Tijerina*, 412 F.2d 661, 666-667 (10th Cir. 1969) ("overriding interest" in fair criminal process "may be thwarted unless an order against extrajudicial statements applies to all parties"); *United States v. McVeigh*, 964 F. Supp. 313, 316 (D. Colo. 1997) (similar).

2. Acting in a careful and incremental manner, the district court properly applied these legal standards to Stone's troubling conduct.

a. *February 21, 2019 Order*

Faced with "considerable publicity" fueled by the "defendant himself," the court invited views on whether to restrict both parties' public statements. 1A41-42. Given

Stone's opposition and prediction that publicity "will subside," 1A31-37, the court initially barred only courthouse-adjacent comments. 1A53-54. Within days, however, Stone posted a threatening photograph of the judge with crosshairs and accused the court of bias and amplified the message with media statements. 1A84-86, 103. In response, the district court held a hearing and entered its February 21 order.

That order was well within the court's discretion. The court carefully considered Stone's testimony and submissions by his attorneys and made numerous findings—none of which petitioners seriously challenge. The court found that Stone had already engaged in speech that could incite violence, 1A102-107, that Stone's "evolving and contradictory" testimony about the crosshairs image was not credible, 1A102, that his "very likely" intent was to "taint the jury pool," 1A109, and that he acted just three days after the court's entry of a minimal restriction, 1A104-105.

Consistent with *Gentile* and *Sheppard*, as well as the Bail Reform Act, the court noted its responsibility to "ensure that the trial does not devolve into a circus," and found that Stone's statements could "incite others" and "frustrate" the paramount goal of ensuring "a fair trial by an impartial jury." 1A102-108. Accordingly, the court entered the least restrictive order that would mitigate these threats. Stone's own attorney conceded that Stone "sometimes is unrestrained." 1A92. And when asked what Stone "would find clear enough to follow," defense counsel outlined what ultimately became the February 21 order, stressing that it would "address the specific needs" here and urging "[t]hat's what should be done." 1A98-99. The court accordingly established the

"clear boundaries" that appeared necessary by following defense counsel's suggestion. 1A108. This kind of analysis and order is consistent with restrictions imposed by other district courts and upheld by many courts of appeals and does not approach a clear abuse of discretion that can warrant mandamus. *See, e.g., Brown*, 218 F.3d at 428-431; *Dow Jones*, 842 F.2d at 611-612; *Tijerina*, 412 F.2d at 662-667; *McVeigh*, 964 F. Supp. at 316; *see also United States v. Cutler*, 58 F.3d 825, 835-837 (2d Cir. 1995); *Russell*, 726 F.2d at 1008-1011.

b. *July 16, 2019 Order*

Undaunted by the court's order, Stone repeatedly violated his conditions of release and continued to demonstrate a lack of care and candor. Soon after the February hearing, it became apparent that Stone had concealed pertinent information about a forthcoming book. 1A219-220. Stone then took a "nudge at the line" in a "Who Framed Roger Stone" posting and issued a comment to the press calling a potential witness "a liar." 1A218-229; *see* A26, 190-192. Exercising caution, however, the district court adopted a "wait and see" approach. 1A220.

The court finally acted when Stone made a series of social-media posts about matters that Stone claimed at the time—and continues to claim (*e.g.,* Doc. 158)—are critical to the case. *See* p. 9, *supra*. Stone defended one public comment as approved by his attorney, but defense counsel denied any such recollection. 1A191-192. The defense then offered a series of shifting and hyperformalistic explanations that, as the district court found, required "twist[ing] the facts" and "twist[ing] the plain meaning of

the order." 1A223-224.

The district court again carefully tailored its response to Stone's misconduct. The court recounted the troubling history and found that Stone's "obvious purpose" was "to gin up more public comment and controversy" and target "the legitimacy of this prosecution." 1A221-222. The court was "not inclined" to revoke Stone's bond, which would further restrict his liberty. 1A223. But the court found that Stone either "can't" or "won't" follow the existing order, notwithstanding its apparent "clarity." 1A223-224. "It seems," the court opined, "I'm wrestling with behavior that has more to do with middle school than a court of law." 1A224. To "make the restriction even more clear so that it calls for no interpretation" the court therefore prohibited Stone from communicating on Instagram, Twitter, or Facebook. 1A224.

The district court's final modification of Stone's release conditions was a permissible exercise of discretion and narrowly tailored to mitigate a substantial risk of prejudice. In fact, faced with a criminal defendant who had repeatedly violated the prior order, dissembled, and proven unable or unwilling to abide by conditions of release, the court would have been amply justified in revoking Stone's bond.[4] Instead, having

[4] *See* 18 U.S.C. § 3148(b)(1)(B), (2)(B) (court should revoke release if the defendant violated a condition of release and is unlikely to abide by any condition); *United States v. Minor*, 204 Fed. App'x 453, 454-455 (5th Cir. 2006) ("these findings alone are sufficient to justify revocation"); *cf. United States v. Manafort*, 897 F.3d 340, 348 (D.C. Cir. 2018) (defendant's "course of conduct" including prior "abuse" of the court's trust, "push[ing] the envelope" of governing orders, and trying to shape witness testimony justified conclusion that no release condition would work, particularly after having been "warned about 'skating close to the line'").

already found that Stone was intent on influencing the jury pool, and that he would not follow an order (suggested by his own counsel) about case-related public statements, the court devised a further alternative: a content-neutral, bright-line rule that "calls for no interpretation"—barring Stone from posting in particular forums where he had failed to exercise restraint. This order better protects Stone's First Amendment rights and ability to prepare for trial than the alternative of incarceration and is narrowly tailored to the unusual circumstances.

B. Petitioners Have Not Established Any Error, Let Alone Clear Error

1. Petitioners' only legal objection is that (Pet. 25-26) that there must be "clear and present danger or a serious and imminent threat" before a court can restrict extrajudicial statements by parties to criminal trials—the same standard that governs orders imposed on the media, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). The Supreme Court recognized in *Gentile*, however, that "the speech of *those participating before the courts*" can be "limited" based on a lesser showing than that required to limit speech about pending litigation by those who are not participants. 501 U.S. at 1072 (Court's emphasis); *see id.* at 1074 (upholding the restriction on attorney speech "under a less demanding standard than that established for regulation of the press"). *Gentile* drew a clear "distinction between participants in the litigation and strangers to it." *Id.* at 1072-1073 & n.5; *see also Sheppard*, 384 U.S. at 361 (stressing that courts should "proscribe[] extrajudicial statements by any lawyer, party, witness, or court official which divulge[s] prejudicial matters"); *Nebraska Press Ass'n*, 427 U.S. at 553-554 (emphasizing *Sheppard*'s

admonition that "'[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.'").

While the district court made clear (*e.g.,* 1A51, 62, 106-107) that its constitutional analysis was guided by *Gentile*, petitioners do not even cite that case. Instead, as discussed below, petitioners rely on three cases—two civil suits and one case involving an attorney who did not represent any party—that themselves applied different legal tests. And, as discussed, many circuits have applied *Gentile*-like tests. *See* pp. 15-16, *supra*. When legal questions are "open" or authorities conflict, that is "the antithesis of the clear and indisputable right needed for mandamus relief." *Al-Nashiri*, 791 F.3d at 85-86.

In all events, sound reasons exist for applying *Gentile* to criminal defendants. Like attorneys, defendants in criminal cases have privileged access to pertinent information—including anticipated evidence and planned strategy. *Brown*, 218 F.3d at 428; *see Gentile*, 501 U.S. at 1072-1073. And comments from any participant—attorney or defendant—"may be expected to be perceived quite differently by jurors." *McVeigh*, 964 F. Supp. at 316. If anything, courts should have greater leeway to regulate defendants who are subject to additional restrictions on their liberty, *see, e.g.,* 18 U.S.C. § 3142, and who, unlike lawyers, are not subject to separate ethical rules and discipline, *see Brown*, 218 F.3d at 428; *cf.* 1A98-99 (defense counsel's acknowledgment that "officers of the court" know what is inappropriate).

Under petitioners' view, by contrast, courts must analyze conditions of release for a defendant who has been indicted by a grand jury and faces trial in the same manner as an order imposed on reporters covering that case. Nothing in petitioners' cited authorities supports that anomalous result, especially in a case where the court followed the defense's suggestion of what "would address the specific needs" here. 1A98-99. Petitioners' argument is particularly anomalous, because the court found that Stone had violated conditions and was unwilling or unable to comply. Under petitioner's view, the district court's only option—absent a clear and present danger—was to incarcerate Stone.

2. Petitioners' remaining arguments (Pet. 22-28) simply urge that the district court should not have found a threat to a fair trial. Yet petitioners do not seriously challenge the district court's series of factual findings about Stone's intentions, behavior, and need for clear rules. Nor do they dispute that Stone repeatedly violated the February 21 conditions of release barring case-related public statements. 1A221.

Petitioners instead urge (Pet. 23-27) that it is virtually impossible for public statements to impede a criminal trial because jurors are subject to voir dire and trusted to follow instructions. Stone never opposed either order on that basis. Although he suggested this view when opposing a media-contact order at the outset of the case, 1A32, he did not take this position when defense counsel suggested an order to "address the specific needs" here (1A98-99) or when responding to allegations that he had violated the February 21 conditions (1A168-177). As petitioners note (Pet. 23), defense

counsel briefly suggested at the July 16 hearing that the fair-trial risk was "overblown" and asked the court to reconsider the February 21 order. 1A216. But when the court invited a written filing to "see what [Stone is] relying on," 1A216-217, the defense did not file anything.

The district court's analysis was in any event correct and not the kind of gross abuse of discretion that could warrant mandamus. *Gentile* considered and rejected a similar argument. The Supreme Court acknowledged that in some instances threats to a fair trial can often be addressed through voir dire and other procedures. 501 U.S. at 1075. But the Court made clear that there is a compelling interest in preventing statements "likely to prejudice the jury venire" and that "[e]ven if a fair trial can ultimately be ensured" through such steps, "these measures entail serious costs to the system." *Id.* This is a sensible approach that should apply equally to criminal defendants. Under petitioners' theory, by contrast, virtually any order barring case-related statements—no matter how inflammatory or prejudicial the statements—would be invalid so long as voir dire and similar procedures could function. *Cf. Hirschkop v. Snead*, 594 F.2d 356, 368 & n.13 (4th Cir. 1979) (en banc) (stating that courts could bar the government from publicizing a confession that would only create a "potential for prejudice"). And under that view, courts must ignore parties' efforts to prejudice the venire, even where "alternatives" pose risks or are highly burdensome. *See, e.g.*, *McVeigh*, 964 F. Supp. at 316 (despite "trust[ing]" that jurors would avoid media, court noted the "potential for prejudice" from inadvertent exposure and declined to sequester jurors).

Although courts of appeals have not been entirely consistent in their approach, court after court has upheld restrictions on participants in pending cases without expressly finding that voir dire and similar tools would be ineffective in countering prejudice. *See, e.g., Brown*, 218 F.3d at 430-431; *Russell*, 726 F.2d at 1010; *Tijerina*, 412 F.2d at 665-667; *see also In re Morrissey*, 168 F.3d 134, 136-141 (4th Cir. 1999); *Cutler*, 58 F.3d at 835-836; *cf. Levine v. United States Dist. Court for Cent. Dist.*, 764 F.2d 590, 598 (9th Cir. 1985) ("Even if an impartial jury could be selected, intense prejudicial publicity during and immediately before trial could allow the jury to be swayed by extrajudicial influences."). And even courts that have required a searching inquiry of such alternatives have been deferential to "the district court's perceptions and its prediction" of risks. *E.g., Dow Jones*, 842 F.2d at 611-612. In all events, the fact-bound nature of these cases and absence of a clear approach is "the antithesis of the clear and indisputable right needed for mandamus relief." *Al-Nashiri*, 791 F.3d at 85-86.

Stone's argument about alternatives also ignores the district court imposed these conditions, in part, because of Stone's threatening Instagram post. Neither voir dire nor jury instructions could address the risks described by the district court to the physical safety of those involved in this case or just using this courthouse. 1A102-107.

3. Rather than engage with the district court's legal analysis or factual findings, petitioners block-quote three decisions that invalidated certain restrictions on case-related speech. Far from supporting a clear right to relief, these cases illustrate the fact-specific natures of these inquiries and underscore that the orders here did not

contravene a governing legal standard.

Petitioners rely heavily (Pet. 21-24) on *In re Murphy-Brown, LLC*, 907 F.3d 788 (4th Cir. 2018). That decision concerned a series of civil cases where a district court, *sua sponte*, imposed "stringent restrictions on participants *and potential participants*." *Id.* at 792 (emphasis added). All parties agreed that portions of the order were invalid. *See id.* at 792-793. While on appeal, the district court vacated its own order, but the court of appeals nonetheless issued a writ of mandamus. *Id.* at 793-795. The panel stressed that the order concerned defined subjects, and was therefore content-based, and then applied the Fourth Circuit's governing "reasonable likelihood" standard. *Id.* at 796-798. In contrast to the district court's careful analysis here, the Fourth Circuit in *Murphy-Brown* stressed that the district court acted "without adequate factual findings or development of a record" and concluded that "based on the record before [it]," the order at issue was not necessary to protect the civil jury from reaching an impartial verdict. *Id.* at 798-800.

In re Goode, 821 F.3d 553 (5th Cir. 2016) (cited at Pet. 25) similarly involved regulation of someone with a questionable relationship to the case and a failure to make requisite findings. *Goode* concerned an attorney informally "assisting" a pro se, attorney defendant but not representing him "in any capacity." *Id.* at 555. When one defendant committed suicide and a mistrial appeared imminent, Goode gave brief comments to a newspaper about the suicide and asserted the deceased's innocence. *Id.* The district court *sua sponte* initiated sanctions proceedings, based on its view that Goode violated

local and professional rules. *Id.* at 556. The panel found those rules invalid, as applied to these particular facts, to the extent that they barred virtually all case-related speech, including a statement about a defendant's suicide, without any findings about the risks posed or need for such a restriction. *Id.* at 561-562.

Finally, *Dan Farr Productions. v. United States Dist. Court*, 874 F.3d 590 (9th Cir. 2017) (cited at Pet. 25-26) involved a trademark-infringement action with potential nationwide consequences where the court barred the civil defendants from expressing any views on the case or reposting public documents, and ordered them to post a "disclaimer" on their "website, social media site, and any print or broadcast advertisement" related to the suit's subject matter. *Id.* at 591-593. Applying the Ninth Circuit's pre-*Gentile* standard, the panel asked whether the prohibited speech "constitute[d] a serious and imminent threat to [the] to a fair trial." *Id.* at 593. The court noted the absence of any connection between the likely speech and venire and stressed that "[t]his civil trademark infringement action involves issues that are far more banal" than those that would likely inflame a jury pool. *Id.* at 594. In such a "run-of-the-mill" proceeding, the panel stressed that the district court had barred even "referencing" public documents and "mandated that [one party] prominently and ubiquitously articulate a 'disclaimer' that, at the very least, incriminates and disparages their previously expressed opinions." *Id.* at 596. The order was also "unmoored" from protecting the jury pool, as it did not prevent media outreach. *Id.*

* * *

In sum, the district court carefully applied the most applicable Supreme Court precedent to unusual circumstances, based on detailed findings and a careful review of the record and Stone's own in-person testimony. Petitioners have not satisfied the extraordinary burden of showing that this exercise of discretion warrants mandamus.

II. Petitioners Have Not Established The Other Requirements Of Mandamus

Not only have petitioners failed to establish any clear abuse of discretion by the district court, but they also have not shown the other elements necessary for the extraordinary mandamus remedy.

A. As an initial matter, mandamus petitioners must show that "no other adequate means" exists to obtain relief. *Al-Nashiri*, 791 at 78. Petitioners do not attempt to meet this burden.

Several courts have held that a "challenge to the imposition of a condition of release is immediately appealable," under the Bail Reform Act and the collateral-order doctrine. *E.g., United States v. Gigante*, 85 F.3d 83, 85-86 (2d Cir. 1996) (citing 18 U.S.C. § 3145(c)); *Brown*, 218 F.3d at 422 (collateral order); *United States v. Scarfo*, 263 F.3d 80, 87-88 (3d Cir. 2001) (same); *see* Wright & Miller, *Federal Practice & Procedure*, § 3918.2 (2d ed.) (appeals can "challenge any condition of release, subject to the possibility that some conditions may [be too] trivial"). Stone did not appeal, however, even in conjunction with his mandamus petition. If an appeal were available—even if Stone missed the

deadline—mandamus is not. *See Helstoski v. Meanor*, 442 U.S. 500, 508 n.4 (1979); *In re Ozenne*, 841 F.3d 810 (9th Cir. 2016); *Demos v. U.S. Dist. Court For Eastern Dist. of Washington*, 925 F.2d 1160, 1161 n.3 (9th Cir. 1991); *In re Adams*, 686 F.2d 108, 110 (2d Cir. 1982); *Diamond v. U.S. Dist. Court for Central Dist. of California*, 661 F.2d 1198 (9th Cir. 1981).

Petitioners do not argue that appeal was not an option or explain why that would be so. Petitioners' decision only to seek mandamus (and only to cite mandamus decisions) may suggest a view that appeal is unavailable or may be the result of acting after the appeal deadline expired, *see* Fed. R. App. P. 4(b)(1)(A)(i). The Court (and the government) should not have to guess at petitioners' theory. The failure to address this prerequisite to mandamus is a further basis to deny the petition.[5]

B. Petitioners have also failed to demonstrate that mandamus "is appropriate under the circumstances." *Al-Nashiri*, 791 F.3d at 78. Even where the other threshold requirements are satisfied, "a court may grant relief only when it finds compelling equitable grounds." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (citation omitted); *see Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-312 (1917) (Mandamus awarded "in the exercise of a sound judicial discretion" and "largely controlled by equitable principles.").

[5] Because the petition was filed in this Court (not the district court) and after the appeal deadline, it could not be treated as a notice of appeal. *See Helstoski*, 442 U.S. at 505-508 & n.4 (1979); *Calderon v. U.S. Dist. Court for Cent. Dist. of California*, 137 F.3d 1420, 1422 (9th Cir. 1998).

Although petitioners refer to the July 17 order that summarized and clarified the two prior conditions imposed on Stone, their petition primarily challenges the February 21 reasoning and conditions. The February 21 order was entered, in part, at the defense's suggestion, and Stone did not seek further review. When defense counsel stated on July 16 that he wanted the court to reconsider that prior order, the court stated that it would consider a written motion "with an open mind" and "see what [Stone is] relying on." 1A217. But the defense filed no motion. Instead, five-and-a-half months after the district court entered the February 21 order, Stone sought mandamus from this Court. Equitable relief is subject to the doctrine of laches. *Unided States ex rel. Arant v. Lane*, 249 U.S. 367, 371 (1919). Having waited months and declined the opportunity to explain his arguments and allow the district court to address them, Stone (and his relatives) cannot obtain a writ of mandamus. *See 13th Regional Corp. v. U.S. Dep't of the Interior*, 654 F.2d 758, 763 (D.C. Cir. 1980) ("mandamus must be sought with 'reasonable promptness'").

Additionally, equitable remedies like mandamus should be granted only in aid of those who come to court with clean hands. *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 209 (1911). Stone does not. In a case where Stone is charged with witness tampering that included telling a witness to "'[p]repare to die,'" 1A24, Stone posted a picture of the district judge with crosshairs. He gave evolving and contradictory testimony and concealed pertinent information. After pleading for a second chance and promising to act scrupulously, he then repeatedly violated the February 21 order.

He defended one such violation as guided by advice of an attorney who denied recalling that advice. He now challenges an order that the defense in part suggested to the district court. And while the district court deferred initiating contempt proceedings because they "could generate more pretrial publicity," 1A223, Stone nonetheless draws more attention to these matters as trial approaches. Stone's contumacious conduct and gamesmanship further supports denial of mandamus.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

Dated: September 26, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this filing contains 7,694 words and has been prepared in 14-point Garamond, a proportionally spaced typeface.

/s/
Adam C. Jed

CERTIFICATE OF SERVICE

I certify that I have filed and served the foregoing through the ECF system.

/s/
Adam C. Jed

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The mandamus petitioners are Roger J. Stone, Jr., Nydia Stone, Adria Stone, Jeanne Rouco-Conesa, and John Bertran. The United States is opposing the petition. *See* D.C. Cir. R. 21(b). David Andrew Christenson has moved to intervene and submitted notices styled as amicus filings.

B. Rulings Under Review

The petitioners ask for a writ of mandamus directing the district court to vacate orders entered by the Honorable Amy Berman Jackson, United States District Court for the District of Columbia, in *United States v. Roger J. Stone, Jr.*, Case No. 19-cr-18. The orders at issue were entered on February 21, 2019, July 16, 2019, and July 17, 2019 and are reproduced in Volume 1 of the petition appendix, at 1A114-115, 1A227-228, and 1A229-230 respectively, as well as additional portions of hearing transcripts contained in the appendix and cited by the parties. The orders are unreported.

C. Related Cases

The only related case of which the government is aware is *United States v. Roger J. Stone, Jr.*, Case No. 19-cr-18 (D.D.C.), from which this mandamus action arises.